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ABSTRACT

This report asserts that there are several findings and recommendations which have been included in the Commission on Opportunity in Athletics' report, which made recommendations for substantial changes to current Title IX guidelines and policies. It fundamentally disagrees with the tenor, structure, and significant portions of the content of the report, asserting that: it fails to present a full and fair consideration of the discrimination women face in athletics; any recommendations made by the majority would seriously weaken Title IX's protections and reduce opportunities for girls and women; and only one of the proposals would address budgetary causes underlying the discontinuation of men's teams. This report examines reasons why it cannot support many of the Commission's key recommendations, and it identifies problems with the Commission's process which contributed to problems with the report and with the recommendations that will weaken Title IX's protections. The paper asserts that these problems are due to a process, established by the Commission, that did not adequately focus on critical issues, did not compile all necessary evidence to fully address the state of gender equity in U.S. schools, and did not allow sufficient time for Commissioners to conduct a careful review of evidence that was compiled or an assessment of the potential impact of various recommendations. (SM)

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ED 475 842

MINORITY VIEWS ON THE REPORT OF THE COMMISSION ON OPPORTUNITY IN ATHLETICS

Report Submitted By
Donna de Varona
Julie Foudy

February 2003

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MINORITY VIEWS ON THE REPORT OF THE COMMISSION ON OPPORTUNITY IN ATHLETICS
February 26, 2003

Report Submitted By
Donna de Varona
Julie Foudy

INTRODUCTION

In June, 2002, Secretary of Education Roderick Paige created the Commission on Opportunity in Athletics to evaluate whether and how current standards governing Title IX's application to athletics should be revised. The Commission is today transmitting its report to the Secretary, a report that includes recommendations for substantial changes to current Title IX guidelines and policies.

After careful review and deliberation and unsuccessful efforts to include adequate discussion of our minority views within the majority report, we have reached the conclusion that we cannot join the report of the Commission. We are instead releasing this Minority Report and request that the Secretary include this document in the official records of the Commission's proceedings.

Our decision is based on (1) our fundamental disagreement with the tenor, structure and significant portions of the content of the Commission's report, which fails to present a full and fair consideration of the issues or a clear statement of the discrimination women and girls still face in obtaining equal opportunity in athletics; (2) our belief that many of the recommendations made by the majority would seriously weaken Title IX's protections and substantially reduce the opportunities to which women and girls are entitled under current law; and (3) our belief that only one of the proposals would address the budgetary causes underlying the discontinuation of some men's teams, and that others would not restore opportunities that have been lost.

This Minority Report is divided into three sections. The first presents the findings and recommendations that we believe the Commission should have included in its report — a substitute report. The second section addresses the reasons that we cannot support a number of the Commission's key recommendations. The third section identifies some of the problems with the Commission's process that we believe contributed to the problems with the report and with the recommendations that will weaken Title IX's protections.

With regard to this last point, in our view, the problems with the report are the result of a process, established by the Commission staff, that did not adequately focus on critical issues, did not compile all of the evidence necessary to fully address the state of gender equity in our nation's schools, and did not allow sufficient time for Commissioners to conduct either a careful review of the evidence that *was* compiled or an assessment of the potential impact of various recommendations.

We ask that the Commissioners and Secretary give careful consideration to this Minority Report. Title IX has been one of our country's most important and most effective civil rights laws, and the public deserves the fullest possible education about, access to, and consideration of, the issues at stake in the important debate about the law's application to athletics. Ensuring that Title IX's goal of equal opportunity is reached demands no less.

PART I: FINDINGS AND RECOMMENDATIONS

A. Findings

Finding 1

Title IX, and the three-part test, have promoted great advances for women and girls to participate in sports.

Title IX, and the three-part test that implements it, have opened doors for millions of women and girls to obtain the benefits of participating in competitive athletics. While fewer than 32,000 women participated in college sports prior to the enactment of Title IX,[1] today that number has expanded nearly five-fold – or more than 400% -- to approximately 163,000 women.[2] Opportunities for girls at the high school level have grown even more dramatically; since 1972, female participation in high school athletics has skyrocketed by 847%, from 294,000 to almost 2.8 million.[3]

Finding 2

Despite these advances, discrimination still limits athletics opportunities for girls and women at both the high school and college levels today.

Despite Title IX's success in opening doors to women and girls, the playing field is far from level for them. For example, although women in Division I colleges are 53% of the student body, they receive only 41% of the opportunities to play sports, 36% of overall athletic operating budgets, and 32% of the dollars spent to recruit new athletes.[4] Girls at the high school level receive 1.1 million fewer opportunities to play sports than their male counterparts.

Among other things, these disparities affect women's access to the financial assistance that can increase the ability to pursue a college education; it has been estimated that men receive $133 million more *per year* than women in athletic scholarships.[5] Additionally,

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1 Department of Health, Education and Welfare, *Policy Interpretation*, 44 Fed. Reg. At 71419 (1979).

2 U.S. General Accounting Office, No. 01-297, *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams* (hereafter "GAO Report"), March 2001, at 7.

3 National Federation of State High School Associations (NFHS), *2001 High School Athletics Participation Survey*.

4 NCAA, *Gender Equity Report* (2000) at p. 20.

5 *See* NCAA, *Gender Equity Report* (2000), tables at pp. 16, 28, 40, 52, 64.

women at all educational levels continue to be subjected to inequities in the treatment of their teams, from inferior equipment and facilities to disadvantageous scheduling and opportunities to receive coaching.

Finding 3

Enhancing athletic opportunities for young women and girls is of vital importance because of the significant benefits those opportunities provide.

Competitive athletics promotes physical and psychological health; responsible social behaviors; greater academic success; and increased personal skills.[6] A recent study by the Oppenheimer Fund found that more than four out of five executive businesswomen (82%) played sports growing up – and the vast majority say lessons learned on the playing field have contributed to their success in business.[7] And for low-income women and girls, the financial support made available through athletics scholarships can mean the difference in being able to attend college at all.

Finding 4

The fact that women and girls have fewer opportunities in athletics than men reflects the persistent discrimination against them, not lack of interest.

Although the Commission heard allegations that women are less interested in participating in sports than men, the history of Title IX flatly contradicts this assertion. The dramatic increases in participation at both the high school and college levels since Title IX was passed show that when doors are opened to them, women and girls will rush through. And the fact that 2.8 million girls play sports in high school refutes any claim that there is insufficient interest to fill the approximately 170,000 slots now available to participate in intercollegiate athletics or the additional opportunities to which they are entitled under the law.

Courts have repeatedly recognized that the stereotype that women are less interested in sports than men is unfounded and unlawful. As one court stated, "interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. . . . [W]omen's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports."[8]

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[6] *See, e.g.*, Teegarden, Proulx, et al., *Medicine and Science in Sports and Exercise*, Vol. 28 (1996), pp. 105-13 (citing health benefits); D. Sabo, et al., *The Women's Sports Foundation Report: Sport and Teen Pregnancy* (1998) (adolescent female athletes have lower rates of sexual activity and pregnancy); NCAA, "Study on Graduation Rates," in *NCAA News* (June 28, 1995) (female student-athletes have higher grades, are less likely to drop out, and have higher graduation rates than their non-athletic peers).

[7] *Game Face*, "From the Locker Room to the Boardroom: A Survey on Sports in the Lives of Women Business Executives," Feb. 2002.

[8] *Cohen v. Brown University*, 101 F.3d 155, 178-79 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

Finding 5

Advances in opportunities for girls and women have not resulted in an overall decrease in opportunities for men.

The Commission heard testimony that there has been an unfortunate loss of men's teams, particularly in non-revenue and Olympic sports. Yet, while men on some teams have lost opportunities, those losses have been offset by increases in the number of men playing other sports. Men's intercollegiate athletic participation rose from approximately 220,000 in 1981-82 to approximately 232,000 in 1998-99. Between 1981-82 and 1998-99, football participation increased by 7,199, more than offsetting wrestling's loss of 2,648 participants, outdoor track's loss of 1,706 participants, tennis's loss of 1,405 participants, and gymnastics' loss of 1,022 participants. Other sports that gained participants include baseball (+5,452), lacrosse (+2,000), and soccer (+1,932).[9] In addition, as the chart below makes clear, the number of men's teams increased over this same time period.

NET OUTCOME OF ADDED AND DISCONTINUED TEAMS

	1981-82	1998-99	Change in Number of Teams	Percentage change
Female	5,695	9,479	+3,784	66%
Male	9,113	9,149	+ 36	. 4%

-GAO Report- *Four-Year Colleges' Experiences Adding and Discontinuing Teams, 2001*

Finding 6

When Title IX was weakened in the past, men's teams, particularly wrestling, did not benefit.

Between 1984 and 1988, when a Supreme Court decision suspended application of Title IX to intercollegiate athletics programs and the three-part test was not in effect, colleges and universities cut wrestling teams at a rate almost three times as high as the rate of decline in the 12 years following, when Title IX's application to athletics was reestablished. In the four year period between 1984 and 1988, the number of NCAA institutions sponsoring men's wrestling teams dropped by 53, from 342 to 289 – or approximately 13.3 teams per year. Between 1988 and 2000, that number dropped by 55, from 289 to 234 – or approximately 4.6 teams per year.[10]

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[9] GAO Report at p. __. Data include both NCAA and NAIA institutions, thereby eliminating double counting schools with dual NAIA and NCAA memberships.

[10] NCAA, *1982-2001 Sports Sponsorship and Participation Statistics Report*, p. 119.

Finding 7

The three-part test, adopted by the Department of Education in 1979 and in force since that time, is flexible and fair. All three prongs of the test have been used successfully by schools to comply with Title IX, and each is necessary to give schools flexibility in structuring their athletics program while guarding against freezing discrimination into place.

The three-part test offers three wholly independent ways that schools can show that they are providing equal opportunities to their male and female students to participate in athletics. Schools can show that:

- The percentages of male and female athletes are substantially proportionate to the percentages of male and female students; *or*
- The school has a history and continuing practice of expanding opportunities for the underrepresented gender; *or*
- Even if it is not providing proportionate opportunities, the school is fully and effectively meeting its female students' interest and ability to participate in sports.

Each of the prongs offers a viable means to comply with Title IX's participation requirements, and each has been successfully used by schools. Indeed, the General Accounting Office has found that between 1994 and 1998, more than two-thirds of the schools investigated by the Office for Civil Rights at the Department of Education complied with Title IX's participation requirements under prong two or prong three.[11]

The three-part test as a whole provides substantial flexibility. The first part of the test stands for the basic principle that a school that provides equal opportunity to the women and the men in its student body is, by definition, not discriminating against any of those students. It does not mandate proportionality; it simply authorizes a school to treat women equally with men and says the law will approve it when they do. It is this common-sense principle that has led courts to call this prong of the test a "safe harbor." But if members of one gender are underrepresented among an institution's athletes, this does not mean that the school has not complied with Title IX; it simply means that the school could use one of the other two prongs to demonstrate that it meets Title IX requirements.

The second prong allows schools to show that they have made, and are continuing to make, progress toward equality. And the third prong permits schools to customize equal opportunity requirements to their own campuses, by providing a lower level of opportunity to women where that lower level nonetheless satisfies the interests and abilities that exist. It is difficult to conceive of an enforcement mechanism that could more flexibly accommodate the myriad types of athletic programs that exist on our

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[11] GAO Report at 14.

nation's campuses, as well as the differences among student bodies at different schools, and still be true to the core principles of Title IX's mandate of equality.

Finding 8

The Office for Civil Rights (OCR) has provided extensive guidance on the operation of each prong of the three-part test, but should provide enhanced technical assistance, consistent with that guidance, on the means by which schools can comply with the test. OCR can also do more to ensure consistent interpretation of Title IX by all regional offices.

When it was adopted in 1979, the three-part test was part of a larger Policy Interpretation that described in detail the OCR approach to assessing compliance with Title IX in the area of athletics. In January 1996, the OCR issued a Clarification of the 1979 Policy Interpretation. This Clarification provides specific factors to guide an analysis of each prong, as well as multiple examples to demonstrate, in concrete terms, how each of these factors is applied. Among other issues, the Clarification addresses in detail: (a) how to define an "athlete" for purposes of evaluating proportionality; (b) circumstances in which schools will be given leeway, and need not provide precisely proportional opportunities, under prong one of the test; (c) factors that OCR will consider in assessing whether a school has a history and continuing practice of expanding opportunities; (d) the means by which schools should assess the interests of their students under prong three; and (e) the means by which schools should assess whether there is sufficient ability and expectation of competition to sustain a team under that prong. The numerous examples included throughout the Clarification offer a valuable roadmap for schools seeking to understand the operation of each prong of the test.

The Commission heard testimony that there is confusion about the terms of the three-part test and about the flexibility provided by current Department policies. More technical assistance about the means by which schools can comply with the test, as well as about best practices – as identified, for example, in the 2001 GAO Report – might help to address any confusion that exists. In addition, OCR should ensure that any complaints about inconsistent enforcement by different OCR regional offices are addressed.

Finding 9

The term "safe harbor," used by some courts and OCR to describe the operation of the first prong of the three-part test, is a legal term of art that does not mean that the first prong is the only effective way to comply with the test. OCR can do more to provide enhanced technical assistance to ensure that educational institutions understand that compliance is possible under Prongs One, Two or Three.

In its 1996 Clarification, OCR – using language from the court's decision in *Cohen v. Brown University* – described the first prong of the three-part test as a "safe harbor" for schools. By that designation, OCR used a well-known legal term that, in this context, means simply that schools that can meet the terms of the first prong can evaluate their

compliance with no additional inquiry. The term "safe harbor" is a protection for the institution, but does not mean that the first prong is the only "safe" way to comply with Title IX's participation requirements or that it is more difficult to meet the standards of prongs two and three of the test. The term is a merely descriptive one that adds no legal weight to the operation of the first prong.

Finding 10

The lawfulness of the three-part test has been affirmed by every federal appellate court to consider the issue.

The three-part test has been the subject of substantial litigation since its adoption, in cases brought both by women who assert that they have been denied participation opportunities and by men who claim that the three-part test has resulted in cuts to their teams. In *every* case that has been brought, the federal court of appeals hearing the case has upheld the three-part test and the policies then in place to implement it. Eight out of eight circuit courts have considered the issue and found that the test appropriately implements Title IX requirements.[12] It is well-settled law, and to change it would unleash a new round of litigation, causing real confusion and uncertainty.

Finding 11

OCR has never imposed a financial penalty on a school for failing to comply with the three-part test.

Although permitted to do so by Title IX, OCR has never imposed on a school the penalty authorized for a failure to comply with Title IX: the loss of federal funding.

Finding 12

The three-part test does not impose quotas or require preferential treatment.

Because athletic teams are sex-segregated, schools *themselves* decide how many slots they will allocate to men and how many to women. The proportionality prong does not dictate how many slots, that would otherwise be open to all, must be set aside for women – it merely offers a means of measuring whether the school is dividing the sex-segregated slots it has created on an equal basis. As every appellate court to address the issue has

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[12] *See Chalenor v. University of North Dakota*, 2002 U.S. App. LEXIS 14404 (8th Cir. May 30, 2002); *Pederson v. Louisiana State University*, 213 F.3d 858, 879 (5th Cir. 2000); *Neal v. Board of Trustees of The California State Universities*, 198 F.3d 763, 770 (9th Cir. 1999); *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265, 274-75 (6th Cir. 1994); *Kelley v. Board of Trustees, University of Illinois*, 35 F.3d 265, 270 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995); *Cohen v. Brown University*, 991 F. 2d 888 (1st Cir. 1993), and 101 F.3d 155, 170 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (this case was before the First Circuit twice, first on Brown University's appeal of a preliminary injunction granted by the district court, and the second time after a trial on the merits); *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824, 828 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993); *Williams v. School District of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993).

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recognized, "determining whether discrimination exists in [sex-segregated] athletic programs *requires* gender-conscious, group-wide comparisons."[13]

Finding 13

Title IX does not require mirror image men's and women's sports programs.

Current Title IX enforcement standards consider the total participation opportunities afforded each gender by an institution's athletics program, rather than the numbers or sizes of teams sponsored by the schools. Title IX does not impose a requirement that each women's team be matched by a corresponding men's team or vice versa. Similarly, Title IX does not require that men and women be granted equal numbers of athletic scholarships, but only that overall scholarship dollars be allocated equitably among male and female athletes.

Finding 14

Title IX does not cause cuts to men's teams.

Nothing in Title IX or its policies requires schools to reduce men's opportunities to come into compliance with participation requirements. In fact, GAO data confirm that 72% of colleges and universities that have added women's teams have done so without cutting any teams for men.[14] Additionally, although the Commission was provided with less information on this issue, women's teams have also suffered cuts over the last 20 years. For example, the number of schools sponsoring women's gymnastics dropped from 190 in 1981-82 to 90 in 1998-99 – a decline of more than 50%.[15]

Finding 15

To the extent that schools have discontinued men's – and women's – athletic teams since Title IX was passed, there are many reasons for those decisions. Most notably, budgetary decisions, the athletics "arms race," excessive expenditures, and philosophical decisions related to the appropriate quality and size of athletic programs have resulted in the loss of opportunities for other sports.

Title IX does not limit an institution's flexibility in deciding how budgets will be allocated among sports or teams. There can be no question, though, that the cost of operations in intercollegiate athletics has escalated rapidly. This escalation in expenditures is often referred to as the "arms race" because as one school escalates its spending on revenue-producing sports, its competitors feel required to match that move to retain competitiveness. It is clear from testimony that this "arms race" has been the catalyst for the discontinuation of many teams. And the Commission received substantial

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13 *Neal v. Board of Trustees of The California State Universities*, 198 F.3d 763, 770 (9th Cir. 1999) (emphasis added).

14 GAO Report at p. 14.

15 GAO Report at 12.

information on the spiraling costs of coaching salaries, perquisites for players, and luxurious athletic facilities that increasingly strap college athletics budgets and force reductions in other expenditures for sports.

Finding 16

Rules set by the National Collegiate Athletic Association (NCAA) could be hampering schools' ability to comply with Title IX.

The Commission heard testimony that the NCAA limits the number of scholarships that colleges and universities can provide to their male and female athletes. While they do not dictate the level of participation opportunities, these scholarship limits could nonetheless be hampering schools' efforts to provide equal opportunities for women. If, for example, a school could demonstrate that it had the financial resources to expand the scholarship benefits for a current women's team but not to create a new team, it would merit further inquiry to determine if NCAA limits hinder that approach. The same is true for other NCAA rules that may have problematic consequences.

Finding 17

"Walk-on" student-athletes cost money and receive the benefits of participating in intercollegiate athletics. To the extent that men walk on more than women, intangible benefits accorded to men's teams and the persistent budgetary barriers that limit the extent to which women's teams can support additional players have been identified as causes.

Walk-on athletes – typically, those players who do not receive athletic scholarships -- receive the benefits that stem from participation in athletics, including coaching, practice, training services, medical benefits, equipment, uniforms, preferential course scheduling, academic support programs, pre-season training period room and board, access to weight rooms, and the like. It is clear that provision of these services to additional athletes costs money. In addition, the addition of walk-on athletes to a team forces a school to reconsider its coaching ratios to ensure that all players receive adequate attention. As a result, there are costs and competitive considerations that influence a school's decision whether to limit the permissible number of walk-ons.

Women's teams often lack the resources to provide for more than the minimum number of athletes slated by the school for the team. Additionally, because of the history of discrimination to which female athletes have been subject, women's teams sometimes lack the status of their men's counterparts To the extent that men walk on to teams to a greater degree than women, these factors have been identified as causes.

Finding 18

The Office for Civil Rights uses flexible guidelines in helping schools determine whether an activity is a sport.

The Office for Civil Rights has identified five factors that schools can use to determine whether particular activities are sports for purposes of evaluating compliance with Title IX's participation requirements. These criteria preserve school flexibility and should be widely circulated as part of OCR's technical assistance activities.

Finding 19

There is a mechanism by which the Department of Education can systematically monitor participation in athletics and athletic program expenditures at the college levels, the Equity in Athletics Disclosure Act. There is no mechanism in place by which the Department of Education or the public can systematically monitor these variables at the high school level.

The Equity in Athletics Disclosure Act requires colleges and universities to compile data about the gender breakdown of their participation opportunities and scholarship dollars, as well as about their expenditures on, and recruiting and coaching expenses for, men's and women's teams. Because the EADA does not apply to secondary schools, there is no comparable requirement that high schools monitor how they are allocating sports opportunities between their male and female students.

B. Recommendations

Recommendation 1

The Department of Education's current Title IX athletics policies, which have promoted advances toward equality for women in sports, should be preserved without change.

The Department's current athletics policies, in place through Republican and Democratic administrations and upheld by every federal appellate court to examine them, have worked to open doors to millions of girls and women to gain the benefits of participating in competitive sports. The playing field is not yet level, however, and the policies must be maintained in order to ensure that women and girls receive the truly equal opportunity they are afforded by the law.

Recommendation 2

The Department of Education should strongly enforce Title IX standards, including implementing sanctions for institutions that do not comply.

Enforcement should be strengthened, and resources increased, to ensure that discrimination is investigated and addressed in an effective and timely way.

Recommendation 3

Using existing guidance, Department of Education staff should undertake an educational campaign to help educational institutions understand the flexibility of the law, explain that each prong of the three-part test is a viable and independent means of compliance, and give practical examples of the ways in which schools can comply.

Although there is ample guidance, as described in the Findings, that sets forth the standards of current law, some witnesses expressed confusion about the terms of existing policies. The Department should consider assigning resources to enable schools to consult with Department personnel and secure technical assistance during the process of structuring their athletics programs. The Department should also ensure that copies of its guidance are widely distributed to all Department civil rights personnel, at headquarters and in the field, and to educational institutions at all levels of education. It would also be helpful were OCR to place all intercollegiate and interscholastic athletics closure letters and corrective action agreements on its website. Posting of such materials would allow athletics directors and school administrators to identify acceptable solutions and time frames for correcting participation problems.

Recommendation 4

In educating schools about current policies, the Department of Education should advise them that nothing in Title IX requires the cutting or reduction of men's teams, and that to do so is disfavored.

Numerous civil rights laws apply the principle of "equalizing up" in authorizing remedies for discrimination – that is, raising opportunities for the disadvantaged group, rather than diminishing them for the previously benefited group, as a means of achieving civil rights compliance. In providing technical assistance, the Department should advise schools of this principle, as well as providing information on techniques other schools have used to achieve this goal.

Recommendation 5

The Department of Education should encourage educational institutions and national athletic governance organizations to address the issue of reducing the escalating costs of intercollegiate athletics, particularly in some parts of the men's athletics programs, and fostering agreement on reforms.

The Department of Education should play a critical role in establishing and facilitating forums in which these issues can be addressed, as well as in publicizing and seeking agreement to their results. The reduction of excessive athletics expenditures would go a long way toward freeing up resources to support both women's teams and men's lower profile sports. The Department should also initiate conversations about more systemic reforms to eliminate the "arms race" in athletics – reforms that would allow reallocation

of resources to support broad-based sports participation by both male and female students.

Recommendation 6

The Department of Education should encourage educational institutions and national athletic governance organizations to address whether organization rules, such as limitations on the numbers of athletics scholarships, hamper compliance with Title IX participation requirements and, if so, to take corrective action.

Because certain rules, including those of the NCAA, may have turned out to hinder colleges and universities from taking feasible steps to comply with Title IX participation requirements, this issue is ripe for study. As with issues related to controlling escalating costs, the Department could and should play a valuable role in convening and fostering dialogue to address these issues and remedy any problems that are found.

Recommendation 7

The Department of Education should require secondary schools to compile and report the data currently required of colleges and universities under the Equity in Athletics Disclosure Act.

Collection of these data would provide the Department and the public with a valuable tool to assess the status of gender equity in high schools and to monitor school attempts to come into compliance with Title IX requirements. Legislation has recently been introduced by Senator Snowe (R-ME), and the Department should consider supporting that bill. The Department in any event has the administrative authority to require collection of this data even absent legislative action.

PART II: RESPONSES TO COMMISSION RECOMMENDATIONS

The Commission's Majority Report asserts that the recommendations made by the Commission are the product of "strong consensus." However, we strongly disagree with the Commission's major recommendations, and, for a number of them were joined by other Commissioners as well. We believe that these recommendations are contrary to the intent of Title IX, would critically weaken this important civil rights law, and would result in substantial losses of participation opportunities and scholarships for women. We summarize our concerns below.

A. Three Recommendations Would Substantially Reduce the Number of Athletic Opportunities to which Women and Girls are Entitled by Permitting Schools to Count Male and Female Students and Athletes in New Ways.

A number of the Commission's recommendations authorize schools to change the ways in which they count the men and women in their student bodies, on the one hand, and the men and women to whom they provide athletic opportunities, on the other. Singly and

together, these recommendations would allow schools to be deemed as complying with Title IX while substantially reducing the number of participation opportunities they are obliged to provide to women under current standards.

Recommendation 15 would modify the proportionality prong of the three-part test by allowing each school to identify a "predetermined number of participants for each team offered by the institution" and then to count that number of slots as filled – regardless of how many athletes in fact participate on the team. This proposal would allow schools to artificially inflate the percentage of athletic opportunities they give to women by counting opportunities they never actually fill or seek to fill.

The potential for abuse that is inherent in this proposal has long been recognized. In fact, the Office for Civil Rights rejected just such a recommendation in issuing the 1996 Policy Clarification. In determining the number of participation opportunities offered by a school, OCR refused to count "unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes," because "participation opportunities must be real, not illusory" and because "OCR must consider actual benefits provided to real students."[16] To allow a school to count slots which provide *no* actual benefits to *any* real student would make a mockery of any claim that the school was providing equal opportunity.

The recommendation is all the more problematic because women lag significantly behind men in the receipt of dollars spent to recruit new athletes. The average Division I college allocates only 32% of its athletic recruiting budget to women's teams.[17] It is particularly troubling for a school that spends 112% more recruiting men than women – and that then, as a result, has fewer women participating on its women's teams -- to be able to claim credit for providing a "predetermined," but unfilled, number of slots. If Title IX's participation requirements are interpreted in a way that provides no check on these disparities, women will continue to be treated as second-class citizens in schools' recruiting efforts.

Recommendation 17 would also allow schools to change the ways in which they count the athletic opportunities they provide, by allowing schools *not* to count athletic opportunities for men that the schools actually *do* provide. Recommendation 17 provides that proportionality ratios should be "calculated through a comparison of full or partial scholarship recipients and recruited walk-ons," excluding from the count opportunities provided to walk-on athletes as defined by the NCAA.

This proposal would enable schools to pretend that they are *not* giving athletics opportunities to men, and then to reduce their obligation to female athletes accordingly, even though walk-on athletes receive the benefits of sports participation, including coaching, training, tutoring, equipment and uniforms. In fact, by one estimate, a school that excluded from its count athletes who did not receive scholarships could reduce its

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[16] U.S. Department of Education, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test,* at p. 3.

[17] NCAA Gender Equity Report, 1999-2000, at p. 15.

participation gap and thereby reduce by 32 the number of slots to which women would be entitled under current law.[18] This decline in the participation gap is a wholly illusory and artificial reduction; it does not signify that the school has in fact made any progress whatsoever in providing equal opportunities to its male and female students.

Further, it is unclear, as a practical matter, how this recommendation would apply to Division III colleges or to high schools, where athletes are provided no scholarships. Under Recommendation 17, therefore, only "recruited walk-ons" would count in the school's totals. But unlike Division I and II schools, Division III colleges are not required by the NCAA to monitor contacts between coaches and prospective students; as a result, they do not have the means to evaluate whether their walk-on athletes are "recruited" under the NCAA definition. Moreover, Division III schools often lack the funding to send coaches on recruiting trips or to phone or bring prospective athletes to campus. Consequently, large numbers of athletes are likely *not* to have been recruited under NCAA standards, even though they may have been recruited in other ways. Because this proposal does not address whether Division III schools could claim that their athletes are *not* recruited, or what standards regarding recruitment would apply, there could be an even larger loophole in Title IX's protections at Division III colleges – even beyond the impact of the proposal on Division I and Division II schools.

Recommendation 20 provides that in demonstrating compliance with the proportionality prong of the three-part test, "the male/female ratio of athletic participation should be measured against the male/female ratio of an institution's undergraduate population minus nontraditional students." Under this proposal, in other words, schools could exclude so-called "non-traditional" students – defined for this purpose to include students who are not between the ages of 18 and 24[19] and students of any age who have children – as members of the student body whose interests and abilities the schools are obligated to accommodate.

The stereotype that students over a certain age or students who are parents are not interested in participating in sports is both inaccurate and contrary to many Supreme Court cases that have struck down these types of stereotypes. This recommendation would allow every school to presume, for purposes of Title IX, that all students who are over the age of 24 or who have children are uninterested in playing sports. That is unfair to women, who are disproportionately likely to be the "non-traditional" older students excluded under this proposal. Available data show, for example, that among individuals older than 24 who were enrolled in degree-granting institutions in 2001, women outnumbered men by 37%.[20] It is also impractical; in order to equitably apply the principle of exclusion based on parental status, the school would have to identify and

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[18] Welch Suggs, "Getting Ready for the Next Round," *The Chronicle of Higher Education*, Vol 49, Issue 23, p. A39 (Feb. 14, 2003).

[19] The Commission's report suggests that non-traditional students are those over the age of 32. We assume that this is a typographical error, since the Commission clearly intended to exclude those who are "older than the traditional, full-time undergraduate college athlete," and specifically defined those students as students over the age of 24 in the draft report that the majority approved.

[20] U.S. Department of Education, National Center for Education Statistics, http://nces.ed.gov/pubs2002/digest2001/tables/dt174.asp.

exclude not only mothers, but also male undergraduates, of any age, who have fathered children.

The recommendation is also unnecessary, because schools that enroll large numbers of "non-traditional" students are, like other schools, specifically authorized under prong three of the test to consider the interests of that population in allocating their athletic opportunities. To the extent that a school's female students, including those who are "non-traditional," are in fact less interested in participating in sports than men, the school will be in compliance with Title IX if it fully accommodates the interest that exists – even if it falls short of proportionality.

B. Two Recommendations Would Treat Schools as Having Provided Equal Opportunity Even Where They Do Not Actually Provide It.

Two of the recommendations would authorize schools to comply with a proportionality standard without actually providing equal opportunity to their female students – and without satisfying any other prong of the three-part test.

An **unnumbered proposal**, which is included in the report although it received only a tie vote, would direct schools to allocate 50% of their participation opportunities to men and 50% to women regardless of the actual percentage of males and females in the student body, and then authorize schools to fall short of that allocation by 2-3 percentage points. This proposal would, in effect, allow schools to impose a ceiling of 47% of athletic opportunities and scholarships for women – no matter how large the percentage of women in the student body or how many women want to play. Because women typically comprise 53% of the student body at Division IA schools, and 49% of the students at the high school level, this proposal will inevitably result in losses from the opportunities to which women and girls would be entitled under current law. The losses are, of course, likely to be greater at the numerous colleges at which women comprise a higher percentage than 53% of undergraduates – including some powerhouse institutions, such as Florida State University and the University of Georgia, where women are 57% of the student body. The chart below illustrates the projected *annual* losses at each educational level, assuming no reduction in current participation or scholarship opportunities for men, college enrollment of 53% female (average enrollment at Division I-A schools), and high school enrollment of 49.1% female (national average enrollment in grades 9-12).

Similarly, **Recommendation 14** urges the Secretary to allow for a "reasonable variance" from equality if proportionality is retained as a way of complying with Title IX. Because the language is open-ended, it is impossible to put a limit on the losses that girls and women would endure were this recommendation to be adopted; in fact, this proposal could result in greater losses than those anticipated under the unnumbered proposal. This recommendation would authorize the Secretary to treat as sufficient for Title IX compliance a level of participation that falls far short of true equality – subject only to his own, subjective judgment about what is a "reasonable" variance. While we did not object to this recommendation when it was proposed following a confused and truncated Commission discussion, our review of it as drafted in the Commission's report convinces

us that it could create damaging results that would not be consistent with Title IX and that we cannot support.

Lost Opportunities and Scholarships Under Unnumbered Recommendation, Which Could Be Even Greater Under Recommendation 14

	50/50 Standard with +/- 2% Variance (Females = 48%)	50/50 Standard with +/- 3% Variance (Females = 47%)
Participation Losses for Collegiate Female Athletes	43,000	50,000
Scholarship Losses for Collegiate Female Athletes	$103,000,000	$122,000,000
Participation Losses for High School Female Athletes	163,000	305,000

C. Two Recommendations Would Authorize Improper Use of "Interest Surveys" to Limit Opportunities for Girls and Women and to Weaken Prong Three of the Three-Part Test.

Recommendation 18 would allow schools to use "interest surveys" to (a) demonstrate compliance with the three-part test; (b) "accurately predict and reflect men's and women's interest in athletics over time;" and (c) stimulate student interest in sports. Because it would authorize the use of such surveys to reduce schools' obligations to provide equal opportunity to women and girls, this recommendation is fundamentally flawed in numerous respects.

First, the use of interest surveys to reduce the basic obligation of educational institutions to provide equal opportunity is invalid and has been unequivocally rejected by the courts. Using interest surveys is a way to force girls and women to *prove* their right to equal opportunity before giving them a chance to play. The proposal rests on the stereotyped notion that women are inherently less interested in sports than men – a notion that contradicts Title IX and fundamental principles of civil rights law.

As courts have repeatedly recognized, what interest surveys measure is the discrimination that has limited opportunities for girls and women to participate in sports – *not* the interest that exists when girls are given unfettered opportunities to play. As the court in *Cohen v. Brown University* put it, "interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. . . . [W]omen's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports."[21] To allow the use of surveys to limit opportunities for women is simply to

[21] *Cohen v. Brown University*, 101 F.3d 155, 178-79 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

freeze prior discrimination into place – it certainly is not to "accurately predict and reflect men's and women's interest in athletics over time."

Additionally, the evidence proves that women are *not* less interested in sports than men; when the doors of opportunity are opened, women rush through them. As noted above, girls' and women's participation in sports has increased dramatically since the passage of Title IX 30 years ago. Moreover, it is simply illogical to claim that women are less interested in obtaining the economic, physical, psychological and social benefits that stem from participation in athletics. There are 2.8 million girls participating in high school sports, and fewer than 170,000 opportunities to play in college; this fact is alone sufficient to demonstrate that the argument that women are not interested in sports is simply an effort to continue an outmoded stereotype.

Recommendation 19, as described in the Commission's report, suffers from some of the same flaws as Recommendation 18. Recommendation 19 advises the Secretary to study allowing schools to assess compliance with the third prong of the three-part test by comparing the school's ratio of male/female athletic participation to the "demonstrated interests and abilities" shown by high school and other participation rates or by interest levels shown in surveys of current or prospective students at the school. To the extent that this recommendation was intended or would be used to authorize restriction of opportunities for girls and women based on the results of an interest survey – or to modify the third prong of the test to allow merely "relative" rather than full accommodation of the women's interests and abilities that exist – it directly contradicts the court's ruling in *Cohen v. Brown University*. In its 1996 Clarification, OCR has set forth explicit and detailed guidance on the appropriate and lawful ways to evaluate interest and abilities under the third prong of the test, and that guidance must be maintained intact. Upon review of the report's treatment of this recommendation, we cannot agree to it unless the understanding set forth above is made clear.

D. One Recommendation Would Allow Schools to Use Private Funding to Subvert Equal Opportunity for Girls and Women.

Recommendation 12 requests the Office for Civil Rights to reexamine its policies governing the private funding of teams to prevent sports from being dropped or to allow specific teams to be added. Current law is more than adequate to allow such private funding; what supporters of this recommendation apparently have in mind is to enable the Secretary to rewrite long-standing policy to permit private donors to underwrite men's teams without triggering any obligation that schools then treat their women's teams equally. Were the Secretary to accept this invitation, schools could also be authorized to steer private slush funds to male teams without counting them as athletes – or, in other words, to create a loophole that would justify discrimination if subsidized by private funds.

We support having the Office for Civil Rights provide technical assistance to educate schools and the public about the existing standards governing private funding of teams –

but only to the extent that Title IX principles and limitations are respected and conveyed in the process.

E. One Recommendation Offers the Secretary an Open-Ended Invitation to Add New Ways to Comply with Title IX Not Even Considered by the Commission.

Recommendation 23 advocates that the Secretary explore "additional ways of demonstrating equity beyond the existing three-part test." This open-ended proposal could be used to authorize changes to Title IX enforcement mechanisms that the Commission never even addressed, much less approved. Given that the three-part test has stood the test of time – and has been affirmed by both Republican and Democratic administrations and uniformly upheld in the courts – it is inappropriate, particularly when substantial discrimination still exists to be remedied, for the Commission to be proposing what could amount to a wholesale abandonment of this critical enforcement tool. Our careful review of this recommendation in the report – and our analysis of the threat it represents to current policies, which we were unable to conduct under the time constraints of the Commission meeting – convince us that we must withdraw our original consent to this proposal.

* * *

There are other recommendations whose meaning, upon review of the Commission's written report, seems ambiguous. Recommendation 9, for example, encourages redesign of the Equity in Athletics Disclosure Act to provide the public with a "relevant and simplified tool" to evaluate a school's Title IX compliance. While it would be unobjectionable to change EADA reporting requirements to allow schools to supply additional information about their compliance with the three-part test, it would be contrary to our intent in consenting to this recommendation, and contrary to the purpose of the reporting obligation, to use this recommendation to justify an overhaul of the reporting form that would delete key information. We would strongly disagree with any interpretation of this or any other recommendation that would lead to a reduction of the protections in place for girls and women to achieve equal opportunities to participate in athletics.

PART III: PROBLEMS IN THE COMMISSION'S PROCESS

We have set forth above some of the concerns that trouble us about the recommendations that the Commission has now approved. We believe that the problems with the recommendations reflect problems in the Commission process that prevented full consideration of the relevant issues:

- **The Commission's charge failed to ask the critical question: whether discrimination against girls and women persists, and how it can be remedied.** The Commission's charter did not contain the question that should have informed the Commission's efforts from the beginning. Instead, the Commission's focus

was on addressing losses to some men's teams. As a result, the Commission made no inquiry into the question whether the original goals of Title IX have been met – and if not, why.

- **The Commission lacked representatives of important constituencies.** There was no Commissioner who represented the interests and perspectives of Division II or Division III schools, or junior and community colleges. Most significantly, the Commission lacked any representative of high school athletics programs. The Commission's report itself acknowledges the Commission's inability to reach conclusions about the application of Title IX at the high school level; this is a particularly troubling omission because the recommendations, if adopted by the Secretary, will affect the nearly 6 million students who play sports in high school.

- **Witnesses selected by the Department of Education testified two-to-one against current policies, and other expert testimony that was requested was not provided.** The witnesses who were invited to testify were overwhelmingly opposed to current Title IX policies, while witness testimony from supporters of the law was limited. For example, the Department of Education invited at least five panelists from schools sued for failure to comply with Title IX, but selected no witnesses to represent plaintiffs who were victims of discrimination or women whose teams had been cut.

  Moreover, Commissioners requested specific experts whose testimony would have helped inform critical components of the Commission's inquiry. The Department of Education declined to invite these requested experts. To choose just two examples, the Commission did not hear from the author of the authoritative GAO report on participation trends, who would have testified that men's participation opportunities and number of teams have increased, not decreased, over time. In addition, the only witness who was asked to testify about current law was a recent law graduate who was, by her own admission, not well-informed about the 1996 Clarification. We believe that Commissioners were thereby thwarted in their efforts to obtain the best information from the best sources.

- **The Commission had inadequate time for serious review.** Deadlines for Commission consideration of issues and decision-making did not allow Commissioners to do the kind of careful study warranted by the issues. For example, Commissioners had only 6 working days after the last public hearing to list and explain each of their proposed recommendations. Commissioners also had only two working days before the final decision-making meeting in Washington, D.C to review the first draft of the proposed report. Commissioners were given less than a week to respond to the final draft of the report. We specifically urged another meeting of the full Commission to carefully review the language and impact of the final report, to no avail.

- **The Commission was not provided information on, nor therefore was able to consider, the impact of its recommendations.** The Commission was not provided with any data on the effect of its recommendations, including their impact on participation opportunities and scholarships for female athletes. Additionally, recommendations to change the 1996 Clarification were made without an accommodation to the Commissioners who requested, on several occasions, to circulate and discuss the extensive guidance provided in that Clarification. Commissioners were told that there was insufficient time for this type of analysis.

- **The arrangements made for expression of minority views were insufficient.** The Commission authorized inclusion of short statements of minority views following the recommendations on which there was dissent, but did not allow for any fuller statement of the dissenters' rationales or inclusion of concerns about the drafting of other portions of the report. As a result, the report does not reflect a full statement of the views of each of the Commissioners.

CONCLUSION

Equal opportunity for women and girls in education is of the utmost importance to our nation. The opportunity to participate in athletics is a critical component of that equality, since it opens the door for millions to play sports, receive college scholarships, and obtain other important benefits – including increased health, self-esteem, academic performance, responsible social behaviors, and leadership skills – that flow from sports participation.

Women and girls have made substantial strides toward equality in the 30 years since Title IX was passed. There is much more to be done, however, before Title IX's goals are achieved. Those goals are too important to be compromised by any weakening of the policies that have promoted the advances that have occurred or by anything less than the strongest enforcement of current law.

For these reasons, we ask the Secretary specifically to reject Recommendations 12, 14, 15, 17, 18, 19, 20, 23 and the unnumbered proposal in the majority report and to keep current policies in place without change. Rather than changing the policies that have been so important in opening opportunities for women and girls --when their job is not yet done and when their validity has been consistently upheld – the Department of Education should focus on using those policies to educate schools and the public about the importance of equal opportunity, the need to keep working to achieve it, and the flexibility of the means by which schools can provide it. Women and girls who play sports – and the fathers and brothers who support them – deserve no less.

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